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No. 03-472

IN THE

Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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ARGUMENT

For the first time in our history, the Government has detained hundreds of people for weeks or months and kept the names of the detainees secret. The Government's opposition trivializes and misstates the circumstances surrounding these detentions, and falsely characterizes this case as involving a fact-bound garden-variety FOIA request. On the contrary, this case presents an unprecedented claim to secrecy for mass arrests by the Government and requires review by this Court.

1. This is not an ordinary case by any standard. The United States government rounded up hundreds of Arabs and Muslims in the weeks following September 11 on the flimsiest of "tips" and detained them for weeks or months thereafter. *See* Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 15-16 (April 2003) (available at www.usdoj.gov/oig/special/03-06/full.pdf) ("OIG Report"). Many detainees were not charged with anything at all for long periods and the INS adopted a blanket policy to deny bail without regard to individualized circumstance. OIG Report at 35, 76-77, 87-88. In the end, those whose identities were kept secret were at most charged with civil immigration violations.

A supplemental report just released by the OIG, focusing on only one facility, provides new evidence of abuse, both physical and verbal, inflicted upon detainees by prison officials. Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York*, at 10, 12, 16, 18, 25, 27, 46 (Dec. 2003) (available at http://www.usdoj.gov/oig/special/0312/final.pdf.). While these early reports confirm widespread abuses, the public record is still incomplete. The Court of

Appeals' decision prevents a full accounting of government actions and invites future abuses.

2. The Government took unprecedented and extraordinary steps to keep secret from the American public the identities of these individuals whom it jailed. The Government's contention that "[a]ny secrecy surrounding the arrests is . . . the product of private choice, not governmental dictate" is thus flat out wrong. Opp. Cert. at 11 n.3.

On September 21, the Attorney General ordered the INS to keep all proceedings concerning the INS detainees secret, to keep their names off jail and court dockets and to prohibit government employees from publicly acknowledging their existence.[1] The Justice Department made extensive efforts to keep the detainees' names from appearing on public logs of jail inmates. Their names were not included in the Bureau of Prisons Inmate Locator database and when family or attorneys inquired at federal jails in New York about specific individuals, they were falsely told that the individuals were not there.[2] When the New Jersey ACLU sued for a list of federal inmates being held in two New Jersey state jails pursuant to state law requiring a public jail roster, the Department of Justice intervened and issued a new regulation forbidding the state from releasing the names.[3]

As to individuals detained on material witness warrants, the Government evidently routinely obtained

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[1] *See* Memorandum from Chief Immigration Judge Michael Creppy to all Judges; Court Administrators, Sept. 21, 2001, Exhibit 57, Pl.'s Cross-Mot. for Summ. Judg. and Opp. to Def.'s Mot. for Summ. Judg. (March 18, 2002).

[2] OIG Report at 115-116.

[3] Release of Information Regarding Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 amending 8 CFR Parts 236 and 241 (Dep't of Justice, April 22, 2002) (Interim Rule); Release of Information Regarding Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364-67 (Dep't of Justice, Jan. 29, 2003) (Final Rule).

orders sealing the relevant facts as to their identity; some of the orders apparently also prevented the detainee and his lawyer from informing the outside world about their detention. *See* Opp. Cert. at 4 ("[material witness detainees] have been allowed to contact reporters or the public, *ibid.*, *unless* to do so would violate a court's particular sealing order"(emphasis added)). Despite petitioners' request, the Government still refuses even to identify which courts issued such sealing orders, much less the terms of those orders. The Government may also have obtained orders in habeas proceedings brought by detainees which not only sealed the substance of those proceedings, but also the detainee's identity. *See* Petition for Certiorari, *M.K.B. v. Warden* (U.S. filed July 10, 2003) (No. 03-6747). Because of these extreme secrecy measures, we do not yet know the extent of the Government's secrecy regime.

The Government also took draconian measures to prevent the detainees themselves from disclosing the fact of their detention. Contrary to the Government's assertion, the Government did prevent the detainees from exercising their "private choice" to inform even their families or attorneys of their detention.[4] As confirmed by the OIG Report, "officials imposed a 'communications blackout' specifically for September 11 detainees within a week of the terrorist attacks. During this blackout, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any

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[4] The Government's secrecy regime allowed it to falsely claim to Congress and the public that no one was being held incommunicado. *See, e.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (Nov. 28, 2001) (Testimony of Michael Chertoff, Assistant Attorney General) (available at http://www.senate.gov/~judiciary /testimony.cfm?id=126&wit_id=66) ("Every one of the persons detained, whether on criminal or immigration charges or as a material witness has the right to make phone calls to family and attorneys. None is being held incommunicado.")

telephone calls or send mail." OIG Report at 158-59.[5] In any event, relying on the government to allow an individual to exercise a "private choice" to disclose the fact of his detention does not meet the constitutional requirement that the government keep public records of the names of those it jails so as to protect against abuses.

If the Government had followed the time-honored procedures regarding detention, the names of the individuals jailed after September 11 would have appeared in public records and the public could have determined from those records who was arrested, without asking for the names of detainees arrested in the wake of September 11.[6] *See* Brief *Amici Curiae* The Washington Post, et al. in Support of Petitioners at 6-10. Because of the Government's extraordinary secrecy measures, however, petitioners had no choice but to request the names of those who were detained.[7]

3. There is no merit to the Government's characterization of this case as a record-bound disagreement regarding application of settled principles of law. Opp. Cert. at 15. In reality, the Government asserted and the Court of Appeals adopted, a new and dangerous principle of law: that the Government may withhold the identities of detainees who are not criminally charged on the same basis as it withholds all other law enforcement-related information.

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[5]The Inspector General found that "[t]he first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001." OIG Report at 132-33. The Government also kept secret the arrests of foreign nationals, even when their governments formally inquired about them. *See* Pet. 7 n.8

[6]The Government could have satisfied petitioners' FOIA request by disclosing jail logs and copies of charging documents served on detainees rather than by providing a "list."

[7]Indeed, even when the New Jersey ACLU sought the names of *all* federal detainees in New Jersey jails, without reference to those detained in connection with September 11, the Justice Department stepped in to prevent their release. *See supra* note 3.

This principle, which gives no weight whatsoever to the significance of the public's right to know how the Government exercises its awesome power to deprive people of their liberty, deserves review by this Court.

In its brief, the Government ignores the significance of detention by relying on FOIA cases that allowed it to withhold the names of individuals it had merely *investigated* as opposed to jailed. For example, in *Manna v. Department of Justice*, 51 F.3d 1158 (3d Cir. 1995). The court denied a convicted mafia member's FOIA request to obtain the "names of interviewees, informants, witnesses, victims and law enforcement personnel" involved in his prosecution. *Id.* at 1165; *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) (FOIA request for "investigatory files"). But the FOIA requests in those cases were significantly different from the one at issue here because they did not seek the names of people the Government had actually arrested and detained. *Manna* is not a case where the Government had arrested hundreds of individuals of Italian descent and then refused to release their names after detaining them for months without criminally charging them. Neither *Manna* nor any other FOIA case approves treating the non-disclosure of the names of detainees the same as the non-disclosure of other law enforcement information.

Indeed, earlier in this litigation the Government itself acknowledged the significance of detention. It provided petitioners with a list of the names of the approximately 129 September 11 detainees who were criminally charged, even though such disclosure posed essentially the same risk of harm under section 7 of the FOIA as disclosure of the names of the remainder of the detainees. The Government stated that it was constitutionally required to give petitioners the names of the criminally charged detainees. *See* Defs. Reply in Support of Mot. for Summ. J. at 19 (filed April 15, 2002). But under the First Amendment, the Government is also

required to release the names of those detainees who were not criminally charged.

This Court has articulated the "experience and logic" test for determining the reach of the First Amendment in a series of cases beginning with *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 565-72 (1980). Both elements of the test are satisfied here. As to "experience," the Government has traditionally made public the identity of those it has detained from the time of the Founding to the advent of the modern police blotter. *See, e.g., The Federalist No. 84,* at 474-75 (Alexander Hamilton) (I. Kramnick ed. 1987); Bureau of Justice Statistics, *Report on the National Task Force on Privacy, Technology, and Criminal Justice Information*, NCJ 187669 at 13 (Aug. 2001) (indicating that every state makes its police departments' arrest and detention logs open for public inspection, regardless of whether the detainees have been charged with any crime). And the "logic" of requiring the Government to divulge the names of those it has imprisoned is clear: the public's interest in knowing whom the Government has imprisoned is just as strong—if not stronger—when the Government is detaining an individual who has not been charged with any crime, as to whom there has been no judicial finding of probable cause, as to whom speedy trial rights have not attached, and who is not entitled to the protection of the Sixth Amendment.

The Government declines to address these arguments head-on. Instead, it stretches dicta in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999) concerning the right of *businesses* to obtain the *addresses* of arrestees for commercial purposes. Nothing in that case suggests that the Government may withhold the names of those who have been imprisoned. In fact, the Government recognized this very point in its amicus brief in *LAPD*.

> A governmental decision not to provide any information about some or all arrests might raise different concerns, particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power. This case raises no such issue, because California continues to provide full public access to detailed information on every arrest and crime report--all information, indeed, except the "current address" of the crime victim or person arrested.

Brief For The United States As *Amicus Curiae*, at 27 n.15, *LAPD*, 528 U.S. 32 (1999) (No. 98-678).

Thus, this case raises the crucial question of the applicability of the First Amendment to the Government's suppression of the names of those it detains.

4. If the First Amendment applies to the Government's suppression of the names of those it detains, it is clear that disclosure is required in this case. The Government does not allege that any, much less every one, of the detainees is suspected, based on reliable information, of being a terrorist, or that their detention is unknown to Al Qaeda, or that disclosure of their detention would have substantial effects on its ability to prevent another terrorist attack.[8] Thus it has not shown a compelling interest in withholding the names of the detainees.

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[8] *Cf. New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (J. Stewart concurring) ("I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.").

Even if the Government's refusal to disclose the names of the detainees is judged by the standards of FOIA exemption 7(A) rather than the First Amendment, there is no basis for the refusal. The Government affidavits fail to establish a nexus between disclosure and the alleged law enforcement harms or the required likelihood of harm. As the dissent points out, deference to Government assertions cannot override the logical and factual gaps in the Government's case. Pet. App. 39a-40a. (Tatel, J., dissenting).

The Government never claims in its affidavits that any, much less all, of the detainees are suspected terrorists.[9] To the contrary, it affirmatively acknowledges that many are not suspected of any links to terrorism and do not even "have information useful to the investigation."[10] Pet. App. 43a (Tatel, J., dissenting (quoting Reynolds Decl. ¶ 36, Pet. App. 120a)). Accordingly, the only claim of harm that could even conceivably apply to withholding all of the detainees' names is the Government's "investigation roadmap" argument. But there is no basis to conclude that the names of the detainees rounded up in the immediate aftermath of September 11 would provide terrorists with a valuable road map of the Government's investigation. The terrorists already know,

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[9] None of the detainees whose names are still being withheld have been charged with terrorism or any other crimes; and no more than a handful of the immigration charges against them relate to terrorism. *See* Def Amended Ex. 6 in Support of Gov't Mot. for Summ. Judg. (filed Feb. 5, 2002). While the Government is correct that it is hypothetically possible for the Government to have information linking an individual to terrorism and yet choose to charge him with unrelated and even non-criminal offenses, the Government never alleged that this hypothetical possibility applied to even a single detainee in this case.

[10] This acknowledgment is all the more notable because it is made with regard to the individuals detained as material witnesses, the only category of individuals, who otherwise might be presumed to have some relevant information. *See* Reynolds Decl. ¶ 36, Pet. App. 120(a).

from the Justice Department's public actions and statements, that the Government is focusing its investigation on Arab and Muslim males: the "roadmap" of the investigation is already a matter of public knowledge.[11]

All the other claims of harm by the Government – witness intimidation, etc. – could result from disclosure of a detainee's name only if that detainee had some involvement in terrorism and his detention was unknown to the terrorists. The Government never alleges the former and the latter is contradicted by the Government's assertion that individual detainees were always free to contact their associates and inform them of their detention. *See* Pet. at 21-23. It may be that there is a subset of detainees whose identities could be appropriately withheld, but the Government has not yet made out such a case.

5. The Government also argues that review is unwarranted because the Circuit Court did not decide whether the information may be withheld under Exemptions 7(C) and 7(F), which are concerned with the privacy of the detainees and their safety (and others'), respectively. *See* 5 U.S.C. § 772(b)(7)(C) & (F). This argument ignores the

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[11] Within weeks of the September 11 attacks, the Government disclosed that its detentions resulted from a focus on Arabs or Muslims attending flight schools and on those who had some contact, however minimal, with any of the hijackers. See Brief for Appellees/Cross-Appellants at 8 n.27, No. 02-5254 (D.C. Cir. filed Oct. 15, 2002). The broader sweep of the investigation was disclosed soon thereafter. On December 21, 2001, for example, the Justice Department issued a press release entitled "5000 Interviews Status Report" describing its program of interviews of persons from Islamic countries. *See* http:// www.usdoj.gov/opa/pr/2001/ December/01_ag_663.htm. On January 25, 2002, the Department announced that it would focus its efforts to find "absconders" – individuals subject to deportation orders who have not reported for deportation – on persons who come from countries in which there has been Al Qaeda terrorist activity. *See* Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, Wash. Post, Feb. 8, 2002, at A1.; *see also* OIG Report at 21.

applicability of the First Amendment principles at stake, which require disclosure of the names of the detainees. In any event, FOIA exemption 7(C) provides no basis for withholding the names because, as Judge Tatel noted in his dissent, any privacy interest that the detainees might have must be balanced against the important public interest "in knowing whether the government, in investigating [the crimes of September 11] is violating the rights of persons that it has detained." Pet. App. 51a (Tatel, J., dissenting).

It is hypocritical indeed for the Government to now argue that the privacy and safety interests of those it detained would be compromised by disclosure. The vast majority of individuals involved here appear to have been guilty of nothing more than civil immigration violations. It was the Government that branded them with the stigma of being associated with a terrorism investigation when it had no real basis for doing so. If the Government is concerned about harm to these detainees, it is free to make clear that the individuals whose names it releases had nothing to do with terrorism.

Respectfully Submitted,

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